United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7477

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL EQUIPMENT RENTAL, LTD.,

Plaintiff-Appellant,

- against -

BERNARD QUINTIN and THOMAS QUINTIN, Ind. & d/b/a THE QUINTIN COMPANY Co-partners under the laws of the State of California and DOROTHY K. QUINTIN,

Defendants-Appellees.

B/S

APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

GERALD S. JACOBS
Attorney for Plaintiff-Appellant
410 Lakeville Road
Lake Success, N.Y. 11040
(212) 343-1005

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PRELIMINARY STATEMENT

This is an appeal from the order of Hon. John R. Bartels, rendered in the United States District Court for the Eastern District of New York, dated June 24, 1975. There was no reported opinion of the District Court. (See App. 4).

ISSUES PRESENTED

1. Did the District Court have the discretionary power to award to defendants-appellees $1,000.00 as attorney's fees as a condition for the granting of plaintiff-appellant's motion to restore the case to the calendar?

2. If the District Court had such discretionary power, was the award of $1,000.00 excessive?

STATEMENT OF FACTS

This is an action for the balance of rentals due as a result of the breach of a written equipment lease agreement and written guarantees of payment. The plaintiff-appellant, National Equipment Rental, Ltd., (hereinafter plaintiff) initially commenced this action in May of 1973, in the Supreme Court of the State of New York, County of Nassau, against defendants-appellees Bernard Quintin, Thomas Quintin, The Quintin Company and Dorothy K. Quintin (hereinafter defendants).

Thereafter, on or about June 11, 1973, the defendants, by their former attorneys, GOLDENBOCK & BARELL, filed a petition in this Court requesting transfer of this action from the State Court to the Federal Court. Plaintiff consented to that petition and the matter was transferred to the United States District Court for the Eastern District of New York. During July of 1973, defendants brought on a motion to have this matter transferred to the United States District Court for the Central District of California pursuant to 28 U.S.C. 1404 (a). That motion was denied and the defendants finally served their answer in October of 1973.

On October 16, 1973, this matter was scheduled for a status report and at the request of the former attorneys for the defendants and plaintiff's attorney, the matter was adjourned to November of 1973. The reason given by the then attorneys for the defendants was that they could not contact the defendants herein in order to ascertain certain facts required for a discussion of this matter. (See App. 39) Prior to the status hearing scheduled for November, 1973, the attorneys for the defendants again requested an adjournment and this adjournment was granted to December 13, 1973. It was at this point in time that the then attorneys for the defendants advised counsel for the plaintiff that they intended to make an application to withdraw from this

matter as they were unable to contact the defendants herein when they needed to do so. (See App. 34).

On December 12, 1973, an associate of the attorney of record for the plaintiff was directed to attend Court on the morning of December 13, 1973, but he was unable to do so due to winter weather conditions and the fact that he lives in Suffolk and the hearing was to be heard in Kings County. As a result, that representative was unable to appear in Court on time, but he did in fact appear at the courthouse after the call of the calendar, but the action was stricken anyway. A motion was then brought on to restore this matter to the calendar and it was restored by an order of the District Court dated January 29, 1974. Thereafter on February 19, 1974, another order was issued by the District Court setting matter down for status report March 18, 1975. Due to a clerical mistake the attorney for the plaintiff did not appear for the status report. By reason of said failure to appear, the matter was dismissed by order of the District Court, dated March 18, 1975. Subsequently, a motion was brought on to have the case restored. The motion resulted in an order restoring the case to the calendar and setting it down for a status report on April 22, 1975. Unfortunately, the plaintiff failed to appear on time because of a flat tire. The matter was, in any event, adjourned from April 22nd to May

22nd at the request of the California attorney for the defendants, WALL, FERGUS and SWANSON. When the matter came before Judge Bartels for a hearing on May 22nd, the defendants were, for the first time and unbeknownst to plaintiff represented by new New York counsel NICKERSON, KRAMER, LOWENSTEIN, NESSEN, KAMIN & SOLL. The associate attorney who appeared on plaintiff's behalf was not fully familiar with all of the facts and circumstances of this case's proceedural history and was not in a position to adequately apprise the Court of the defendant's changes of counsel and dilatory conduct. Thereafter, by an order dated June 24, 1975, the District Court dismissed the complaint with prejudice, unless the plaintiff (1) submitted within thirty days affidavits establishing to the Court good cause for plaintiff's failure to appear and (2) paid to the defendants $1,000.00 as attorney's fees incurred as a direct result of plaintiff's failure to appear. The order also provided that after plaintiff had shown good cause for its failure to appear the matter would be automatically restored to the calendar upon payment of the $1,000.00. It is from that part of the order which requires the plaintiff to pay $1,000.00 to the defendants as attorney's fees that the plaintiff appeals.

POINT I

THE COURT ABUSED ITS DISCRETION BY CONDITIONING RESTORATION OF THE CASE TO THE CALENDAR UPON PAYMENT BY PLAINTIFF OF DEFENDANT'S ATTORNEY'S FEES

The order appealed from, in pertinent part, provided:

> ORDERED, that the complaint be, and the same hereby is, dismissed with prejudice, unless plaintiff (i) submits within thirty days from the date hereof an affidavit establishing to the Court that good cause exists for plaintiff's failure to appear at pretrial proceedings on December 13, 1973, March 18, 1975 and April 22, 1975; and (ii) pays to defendants, within ten (10) days of entry of an order restoring the action, the amount of $1,000.00 as attorney's fees incurred by defendants as a direct result of plaintiff's failures to appear. Having satisfied (i) above the case will be restored to the calendar automatically upon payment of $1,000.00.

In Smoot v. Fox, 353 F.2d 830 (6th Cir. 1965), cert., denied, sub nom, League of Women Voters v. Smoot, 384 U.S. 909, 86S.ct. 1342, 16L.Ed.2d 361 (1966)., plaintiff moved the District Court to dismiss its actions for liable with prejudice. The dismissal was resisted by defendants who wished to prove the veracity of the alleged liable. Thereafter the Court of Appeals granted plaintiff-petitioner's mandamus petition and ordered the District Court to dismiss with prejudice on payment of all court costs. The District Judge filed an application for clarification of the term

"court costs" and whether attorney fees could be allowed. Rehearing was denied. Defendants then filed a motion in the District Court for an order providing for $35,000.00 as attorney's fees. Plaintiff-petitioner opposed that motion as beyond the jurisdiction of the District Court after a dismissal with prejudice. The District Judge refused to deny defendant's motion for attorney's fees and indicated that he had previously decided that attorney's fees might be proper. He then set the matter down for a hearing on the issue of the allowability of attorney's fees. Plaintiff-petitioner sought a writ of prohibition before the Court of Appeals. In granting the writ of prohibition the Court of Appeals stated:

> (N)o authority has been found or cited holding that a District Court has discretion to allow attorney's fees and expenses as part of the costs in an action at law. On the contrary, in Ruck v. Spray Cotton Mills, Inc.; 120 F.Supp. 944, 947 (MDNC 1954), the Court stated: "Costs in action at law in the United States Courts are creatures of the statute permitting District Courts to tax attorney fees as costs in actions at law as distinguished from suits in equity".
>
> And in Kramer v. Jarvis, 86 F.Supp. 743, 744 (D.Neb 1949), the Court stated that "(e)cept where it is otherwise provided by statute or rule, attorney's fees are not taxable as costs in actions at law pending in federal district courts..."
>
> To hold otherwise would permit a Federal Court to allow attorney's fees and expenses as costs in a suit for damages for personal injury...or in any other type of action at law which the Court might feel

> was brought maliciously....This would have the effect of deterring the pursuit of legal remedies in Federal Courts, which is contrary to the American system of jurisprudence. It would vest unnecessary and unwarranted power in the Court.

The instant action was brought to recover money damages stemming from the defendant's breach of certain written equipment lease agreements and guarantees of payment. Such an action is clearly one at law rather than equity. Moreover, the dismissal here was involuntary pursuant to Fed. Rules Civ. Proc. rule 41(b) and therefore beyond Fed. Rules Civ. Proc. rule 41(a) (2) which allows the Court to impose on plaintiff's voluntary dismissal"....such terms and conditions as the Court deems proper."

POINT II

ASSUMING ARUENDO, THAT THE COURT HAD THE DISCRETIONARY POWER TO IMPOSE ATTORNEY'S FEES, THE FACTS DO NOT INDICATE THAT PLAINTIFF'S CONDUCT WAS SO HEINOUS AS TO ALLOW THE IMPOSITION OF ATTORNEY'S FEES

In Blackburn v. City of Columbus, 60F.R.D.199 (S.D. Ohio, 1973), the Court refused to impose attorney's fees on a plaintiff voluntarily dismissing under Fed. Rules Civ. Proc. rule 41(a) (2). As obiter dicta the Court said:

> In our country these fees are not ordinarily available in the absence of specific statutory authority... or where exceptional equitable circumstances exist. (Emphasis Added)

Citing, Rolax v. Atlantic Coast Line Ry., 186 F.2d 473 (8th Cir. 1951). (An action against a railroad worker's union for forcing racially discriminatory contract conditions on the railroad's hiring of Negro workers).

There is no statutory authority nor are there such"... exceptional equitable circumstances..." in the instant case that would warrant the imposition of attorney's fees as a condition to restore. While it is a fact that plaintiff failed to appear at status conferences on December 13, 1973, March 18, 1975, and April 22, 1975, the defendants were not prejudice thereby. Indeed, defendant's initial New York counsel (GOLDENBOCK & BARELL) had previously requested of plaintiff's attorney adjournments of two status conferences in October and November of 1973, which requests were granted. Just prior to the status conferences of December 13, 1973 defendant's counsel withdrew because of its inability to contact the defendant in order to prepare the case. (See App. 15). On December 13th, one of the plaintiff's attorneys, in fact, appeared at the Courthouse for the status conference, albeit too late, due to the winter weather conditions which hindered the automobile drive from Suffolk to kings County. Defendant's conduct has made it impossible for both its attorneys and plaintiff's attorneys to make contact in order to further these proceedings. Defendant's attorney did finally appear at the status conference of May 22, 1975. Prior to

that point there was no harm to the defendant in that it no longer had counsel. There has been no harrassment of the def ndants by the plaintiff, but in fact it has been the other way around. Defendants have obtained extensions to answer and adjournments of status conferences, defendants have retained counsel, defendants have lost the services of counsel, defendants have obtained new counsel-and constantly the plaintiff had to go back and forth as to determine which counsel was presently representing the defendants. The legal expenses that the defendants have incurred are usual to the defense of a lawsuit in order to avoid entry of a default judgment and did not spring from plaintiff's failure to appear. In order for defendants to be entitled to the equitable consideration of having their own attorney's fees paid for by the adverse party, surely, the defendants must have cleaner hands than those of these defendants.

> Under the "clean hands" doctrine, one who does not come into equity with clean hands, and keeps them clean, must be denied all relief, whatever may have been the merits of his claim. Hall v. Wright, 240F.2d 787, 794-795 (9th Cir., 1957).

Plaintiff does not dispute the power of the District Court to dismiss a case for want or prosecution under either Fed. Rule Civ. Proc. rule 41(b) or the inherent power to a Judge. The exercise of this power"...is

discretionary and should be sustained upon appeal in the absence of abuse. A dismissal, with prejudice, is a harsh sanction and should be resorted to only in extreme cases. No precise rule can be laid down as to what circumstances justify a dismissal for failure to prosecute but the proceedual history of each case must be examined in order to make such determination. The judge must be ever mindful that the policy of the law favors the hearing of the litigant's claim upon the merits. Davis v. Operation Amigo, Inc., 378F2d101 (9th Cir; 1967). Plaintiff does, however, dispute the power of the District Court to impose attorney's fees based upon all of the facts and circumstances in the instant matter. Certainly, the defendant's conduct was not so exemplary and plaintiff's so heinous that equity would sanction such an award.

POINT III

ASSUMING ARGUENDO, THAT AN AWARD OF ATTORNEY'S FEES WAS PROPER THE AMOUNT OF THE AWARD HEREIN WAS EXCESSIVE

As discussed in Point II the only expenses that the defendants have incurred as a direct result of the plaintiff's failure to appear at the status conference of April 22, 1975 was the cost of an attorney's appearance at the hearing of plaintiff's motion on May 22, 1975. It is inconceivable that said expense would justify an award of $1,000.00 for a single court appearance of such

short duration.

CONCLUSION

Based upon the foregoing, and the record on appeal herein, the order of the District Court should be reversed in part and remanded with the instructions that plaintiff should have this matter restored to the District Court's calendar without the necessity of paying to the defendants any attorney's fees, or in the alternative, said fees should be substantially reduced.

September 30, 1975

Respectfully submitted,

GERALD S. JACOBS,
Attorney for Plaintiff-Appellant
410 Lakeville Road
Lake Success, N.Y., 11040
(212) 343-1005

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

NATIONAL EQUIPMENT RENTAL, LTD.,

No. 75-7479

Plaintiff-Appellant,

-against-

PROOF OF SERVICE

BERNARD QUINTIN and THOMAS QUINTIN, Ind. & d/b/a THE QUINTIN COMPANY Co-partners under the laws of the State of California and DOROTHY K. QUINTIN,

Defendants-Appellees.

STATE OF NEW YORK)ss.:
COUNTY OF NASSAU)

CHARLES JACOBSON, being duly sworn, deposes and says that on the 1st day of October, 1975, at 919 Third Avenue, New York, New York, he served the Brief for the Plaintiff-Appellant and the Appendix herein, upon Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, attorneys for the Defendants-Appellees herein, by delivering to and leaving personally with said attorneys two copies of said Brief and said Appendix.

Charles Jacobson
CHARLES JACOBSON

Sworn to before me this
1st day of October 1975

Jerome Heller

JEROME HELLER
Notary Public, State of New York
No. 30-1743050
Qualified in Nassau County
Commission Expires March 30, 1977

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ **Certification By Attorney** certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ **Attorney's Affirmation** shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ **Individual Verification** being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ **Corporate Verification** the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ **Affidavit of Service By Mail** On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ **Affidavit of Personal Service** On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath